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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ANDRES EFREN ESTRADA, Petitioner.	2 CA-CR 2009-0239-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052643

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 In this petition for review, petitioner Andres Estrada challenges the trial court's summary denial of a successive petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's ruling unless it clearly has abused its discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no such abuse.

¶2 After a jury trial in 2006, Estrada was convicted of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of .08 or more, both while his driver's license was suspended, revoked, or restricted. The trial court found he had two prior felony convictions for DUI and sentenced him to concurrent, mitigated, eight-year terms of imprisonment. This court affirmed the convictions and sentences on appeal. *State v. Estrada*, No. 2 CA-CR 2006-0100 (memorandum decision filed Dec. 15, 2006).

¶3 In April 2007, counsel for Estrada filed a petition for post-conviction relief pursuant to Rule 32, alleging trial counsel had rendered ineffective assistance in not moving to suppress the results of Estrada's blood alcohol tests based on what Estrada alleged was an improper procedure used in drawing his blood. The trial court held an evidentiary hearing before concluding counsel had not been ineffective and that such a motion to suppress would not likely have been granted in any event. Although Estrada subsequently filed in October 2007 a pro se document that this court treated as a petition for review, *State v. Estrada*, No. 2 CA-CR 2007-0314-PR, it was unclear whether that petition was related to the court's ruling

on his first post-conviction petition. In any case, we ultimately dismissed that proceeding on procedural grounds in November 2007.

¶4 Also in November 2007, Estrada filed a new, pro se notice of post-conviction relief, and the trial court appointed counsel to represent him.[1] In February 2009, new counsel filed Estrada's second petition for post-conviction relief, raising the following three issues: (1) ineffective assistance of first Rule 32 counsel in failing to present the strongest issues in the first post-conviction proceeding—namely, ineffective assistance of trial counsel and sentencing error; (2) ineffective assistance of first Rule 32 counsel at the evidentiary hearing held on the first petition;[2] and (3) ineffective assistance of trial counsel, and error by the court, at sentencing. The third claim concerned the mitigating and aggravating evidence the court had considered, which Estrada argued violated *Blakely v. Washington*, 542 U.S. 296 (2004), and his due process rights.

¶5 After the state had filed a response to the petition and Estrada had filed a reply to the state's response, the trial court found he had not presented a colorable claim and dismissed the petition summarily. The present petition for review followed.

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[1]Although this notice preceded Estrada's second petition for post-conviction relief, it does not appear to have been his second Rule 32 notice. The trial court record before us commences not with a notice of post-conviction relief but with Estrada's first petition.

[2]This was the formulation of the issue in counsel's statement of issues on page fifteen of the petition below. In the body of the argument, however, the second issue presented was a claim that trial counsel had failed to marshal sufficient mitigating evidence at sentencing.

¶6 The trial court did not abuse its discretion in dismissing Estrada's second petition for post-conviction relief. Estrada is a nonpleading defendant who had already had a jury trial, an appeal, and a first Rule 32 proceeding asserting a claim of ineffective assistance of trial counsel. He was represented by different counsel in each of those proceedings. For such a defendant, there is no constitutional right to counsel, therefore no constitutional right to effective assistance of counsel, in a successive post-conviction proceeding. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.") (citations omitted); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (absent constitutional right to counsel, there can be no deprivation of effective assistance); *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996) (no constitutional right to counsel in collateral proceedings); *cf. Bennett*, 213 Ariz. 562, ¶ 15, 146 P.3d at 67 (when same attorney served as appellate counsel and first Rule 32 counsel, claim of ineffective assistance of appellate counsel not precluded when brought by different attorney in successive post-conviction proceeding, because first post-conviction counsel could not properly argue own ineffectiveness on appeal). Consequently, Estrada had no legally cognizable claim for ineffective assistance by his first post-conviction counsel.

¶7 His allegations of sentencing error and ineffective assistance by trial counsel at sentencing were precluded because they could have been raised on appeal or in his first

Rule 32 proceeding and were, therefore, waived. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief on any ground "waived at trial, on appeal, or in any previous collateral proceeding"). As a result, those claims, too, were dismissed properly.

¶8 Finding no abuse of the trial court's discretion, we grant the petition for review but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge